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1 EQUAL didn't pop into my mind, because if you look at
2 the EQUAL box and compare the two, one is a blue box,
3 the other one is primarily white. But I could see now
4 in retrospect that read, white, and blue is in EQUAL.
5 So it's just one of those things that sometimes you're
6 surprised at when you look at research findings.

7 Q. In your control, you would agree, because of
8 those things you now know, biases people who said yes,
9 that they'd recognize this box to say EQUAL; right?
10 Because this isn't an EQUAL box. So people are saying
11 that, you believe, because of the elements on it;
12 right?

13 A. I won't say it's biasing. I would say they
14 are more likely to make that association because of
15 colors. But it isn't clear to me -- let's say you used
16 a green box. It isn't clear to me that any more people
17 would give you SPLENDIA if it were a green box.

18 Q. Well, 24 -- let's look at your actual data
19 here. Do you remember what the percent of people that
20 identified this as coming from one source said it was
21 from EQUAL? It's in your report. Do you remember
22 that?

23 A. It might have been half, if I remember.

24 Q. Half of the people that saw this said it was
25 EQUAL, and that's wrong; right? It's not EQUAL's box?

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1 100 people saw this box, 24 of them ultimately said it
2 was EQUAL. That's not a half. It's at quarter.

3 MR. LOCASCIO: I believe I'm just repeating
4 what he said, that I think we are all talking about the
5 yea-sayers who said this box is a source.

6 BY MR. LOCASCIO:

7 Q. Did you say a moment ago, Dr. Mazis --

8 A. What I meant was is that half -- it's late in
9 the day. Had me going there for a minute. What I
10 meant to say was that 24 percent of the people that
11 were shown the box said it was EQUAL.

12 Q. And that it was half of the people who said
13 they had ever seen it before.

14 A. That's correct.

15 Q. Okay. If those people weren't in the EQUAL
16 box because of the elements in common with EQUAL, under
17 your view of yea-saying and market power, chance of
18 those would have picked SPLENDIA because that's a third
19 of the market here in Puerto Rico.

20 A. Might have been a couple more.

21 Q. You don't know how many.

22 A. Don't know.

23 Q. You've got 4 people total using this control.

24 A. Yes.

25 Q. 24 or 24 percent of those people, 24 people,

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1 A. It's not EQUAL.

2 Q. So those people never had an opportunity to
3 say whether they thought it was SPLENDIA or something
4 else, because they looked at what you gave them; they
5 saw, 'Well, it's got a blue packet. It's got some
6 strawberries. I'm guessing anyway. If I'm going to
7 guess I'm probably going to guess EQUAL.' Right?

8 A. Certainly there are people who thought that.

9 Q. And those people are not in your SPLENDIA
10 control. You're not subtracting them out of SPLENDIA
11 because they got pushed into the EQUAL box.

12 A. Yeah, but the point here is -- let's say it
13 was green, I mean is there any reason for people to
14 guess -- any more reason for people to guess SPLENDIA if
15 this box were green?

16 Q. Dr. Mazis, you didn't use a green control.
17 You used this control that has elements in common with
18 EQUAL'S box; right?

19 A. It's does have some elements in common.

20 Q. And as a result you have half of the people,
21 as you say, that saw this box and identified it,
22 connected it with EQUAL, and as a result those people
23 are listed in the EQUAL box and not on the SPLENDIA box.

24 MR. ZALESIN: Objection, Your Honor. Mr.
25 Locascio keeps saying half the people who saw this box.

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1 and now those are all in the 63 or at least most of
2 them, because we looked down at the miscoded ones and a
3 lot of those people never got to answer that question.
4 Right?

5 A. I'm not sure what that has to do with
6 anything, because that's a different issue. You are
7 bringing a different issue. I isn't relevant to the
8 point you are talking about.

9 Q. You don't think it's relevant what the 37
10 people said?

11 A. No, I don't. You can get variation from group
12 to group. No, I don't think it's relevant, because we
13 basically demonstrated that what happened with those
14 37, these 37, they seem to be responding differently
15 than the 63, but there is a lot of things that can just
16 happen by chance.

17 Q. You can't explain it because you don't know.
18 You weren't there and you didn't tabulate the data.

19 A. Right.

20 Q. You mentioned Vince Paladino. Do you know Mr.
21 Paladino.

22 A. Not personally.

23 Q. He's a lawyer in New York. He is published on
24 secondary meaning surveys. Is that what you're
25 referring to?

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1 A. Yes.

2 Q. The question you asked to determine secondary
3 mean was, "Have you seen or purchased one brand or more
4 than one brand that uses a box like this?" Right?

5 A. Or don't you know.

6 Q. That wasn't in the Granutech survey.

7 A. Correct.

8 Q. You added that because you thought maybe that
9 question wasn't so hot.

10 A. I thought it could be improved.

11 Q. The question Paladino and others say is the
12 secondary meaning question isn't 'have you seen or
13 purchased a product.' Is it?

14 A. I don't recall, but obviously there is more
15 than one way to ask these questions.

16 Q. One way 'seen or purchased' sends one message.
17 And there is another way you can ask the question: Do
18 you have a belief as to whether a package like this
19 comes from comes from one company or more than one
20 company or don't you know?

21 Isn't that the rule test for secondary
22 meaning?

23 A. That would certainly be a way to ask the
24 question.

25 Q. Because then you're finding out when you look

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1 Q. But you don't know because you didn't run it
2 with that question; you ran it with the seen or
3 purchased question. Right?

4 A. Yes. As I said, there is more than one way to
5 ask these questions.

6 MR. LOCASCIO: Thank you.

7 MR. ZALESIN: Just one brief follow up point.

8 FURTHER REDIRECT EXAMINATION

9 BY MR. ZALESIN:

10 Q. Mr. Locascio asked you whether you think
11 consumers can tell a difference between SPLEND and
12 SUGAR TWIN. Do you remember that?

13 A. Yes.

14 Q. And I think you said if they presented side by
15 side. Remember that?

16 A. Correct.

17 Q. In the survey that Mr. Johnson did, the
18 confusion survey, were the products ever presented side
19 by side?

20 A. No.

21 Q. How were they presented?

22 A. Just one at a time. Half the people got one
23 box, half of the people got the other.

24 MR. ZALESIN: Nothing further.

25 THE COURT: I have one question.

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1 at a box like this, 'Do you believe it comes from only
2 one company or it could come from multiple companies?'

3 That's the essence of secondary meaning;
4 right?

5 A. Yes, and that's basically the question I
6 asked.

7 Q. You asked them if they had seen or purchased
8 one brand or more than one brand; right? That's your
9 question.

10 A. Yes. "Have you seen or purchased only one
11 brand or more than one brand of no-calorie sweetener
12 that looks like the one I showed you or don't you
13 know?"

14 Q. If I'm a purchaser of one brand and that brand
15 is SPLEND, do you think I'm inclined to answer your
16 question that it all comes from one company more than I
17 would be inclined to answer the question that's the
18 Paladino and the accepted question for secondary
19 meaning?

20 A. And how did you word that again?

21 Q. 'Do you have a belief as to whether a package
22 like this comes from one company or more than one
23 company or don't up know?'

24 A. I don't think the findings would be any
25 different.

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1 THE WITNESS: Yes, sir.

2 THE COURT: Were I to discount the 37 of the
3 control group as to the issues here with respect to how
4 that was jotted down by the interviewers.

5 THE WITNESS: Right.

6 THE COURT: Would 63 still be an adequate
7 control group for me to consider that survey to be
8 valid?

9 THE WITNESS: I would say yes. I'm not going
10 to say that that's a huge number. But I think the
11 point here is that there is so few people that said
12 SPLEND. We are talking about only 4 percent. And if
13 you had double or triple the sample, what's it going to
14 increase to? I mean, it's not going to change that
15 much. The fact that it's so small, that so many people
16 are saying -- so few people are saying SPLEND
17 indicates that -- and when you think about it when you
18 look at this box, this control box, I mean, it makes
19 sense that not that many people are going to say
20 SPLEND. It doesn't look that much like the SPLEND
21 box. So there is a certain proportion of the people
22 that are guessing. But I think it's likely to be very
23 small.

24 So I don't think the number would change very
25 much, based on my experience.

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1 THE COURT: It would still meet the standards
2 of what is an adequate survey for purposes of the
3 issues we have here.

4 THE WITNESS: In my opinion, yes.

5 THE COURT: Do you have a question.

6 MR. LOCASCIO: I don't have a question for the
7 question, Your Honor. I would like to move that Dr.
8 Mazis' testimony be excluded because I don't think it
9 has been shown to be reliable on several points, his
10 testimony on this issue, whether it meets the Daubert
11 standard or any other.

12 MR. ZALESIN: Do you want argument on that
13 now, Your Honor?

14 THE COURT: Yes.

15 MR. ZALESIN: Your Honor, Professor Mazis is
16 highly-qualified expert. I don't think there is any
17 question about that. He has decades of experience in
18 this field in both academia and in government and in
19 business.

20 He has testified that in his opinion this
21 survey meets all the prerequisite.

22 There has been one discrepancy pointed out
23 that there are 37 interviews where for reasons that are
24 quite understandable because the questionnaire said
25 Version 1 across the top, the interviewer circled

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1 THE COURT: I'm not going to rule on your
2 motion right now. But when I am making my findings
3 in this case I make take it into account.

4 So I'm going to take it under advisement right
5 now until I hear the whole on both sides.

6 In the course of my opinion writing I will
7 make a ruling.

8 MR. ZALESIN: I think that's appropriate, Your
9 Honor.

10 MR. LOCASCIO: Thank you, Your Honor.

11 THE COURT: Is that all of your witnesses?

12 MR. ZALESIN: Yes.

13 THE COURT: You are excused.

14 (The witness left the witness stand.)

15 MR. ZALESIN: The plaintiff rests, Your Honor.

16 THE COURT: Okay. We are going to take a
17 short recess and we are going to start with your side
18 of the case which I am sure you are eager to present.

19 (Break.)

20 THE COURT: You may be seated.

21 We will now take up your witnesses.

22 MR. LOCASCIO: Your Honor, both because I
23 think it would be useful for the Court having followed
24 plaintiff's expert on survey evidence and because we
25 have two witnesses in the courtroom now, one, our

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1 Version 1, when it would have been more accurate to
2 circle Version 2.

3 I don't think there is any question that based
4 on the information that's been collected and that Dr.
5 Mazis has testified to. In fact, all 100 survey
6 responses that are on white paper were people who were
7 shown the white box, not the yellow box, and data was
8 entered for the white box.

9 Frankly, that is the only way you can wind up
10 200 yellow interviews and 100 hundred white interviews.
11 I don't think there is any question about what happened
12 here. It's unfortunate that somebody circled the wrong
13 thing. But there was a double, there was a belt and
14 suspenders approach here, and one of the two things
15 worked. That's what happened.

16 To suggest that the entire piece of evidence
17 should be excluded on Daubert basis, I don't think
18 there is any currency in that argument whatsoever.
19 Obviously, it's something can take into account in
20 weighting the evidence, and I think you should do so,
21 but certainly should not be excluded.

22 I've had surveys admitted where the entire
23 survey consisted of 53 people on a preliminary
24 injunction. This is a fairly impressive piece of
25 research on two-week's notice.

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1 survey expert, Mr. Johnson, has a flight back and is
2 trying to go back home to where he lives in Seattle for
3 another matter, I'm not sure about his availability in
4 scheduling.

5 We are going to put him on first, because I
6 think that would be more convenient.

7 THE COURT: I have no problems with that.

8 Counsel, do you have any problems with that,
9 listening to the expert now?

10 MR. ZALESIN: About changing the order of the
11 witnesses, not at all, Your Honor.

12 THE COURT: Then we'll have him first.

13 Was he sworn him?

14 MR. LOCASCIO: I believe he was.

15 Merisant calls Mr. Johnson to the stand.

16 (The witness took the stand.)

17 THE COURT: I remind you you're under oath.

18 THE WITNESS: Thank you, Your Honor.

19 Thereupon,

20 PHILIP JOHNSON

21 was called as a witness and, after having been
22 previously duly sworn, was examined and testified as
23 follows:

24 DIRECT EXAMINATION

25 BY MR. LOCASCIO:

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1 Q. Good afternoon, Mr. Johnson.
 2 A. Good afternoon.
 3 Q. Can you introduce yourself to the Court?
 4 A. My name is Philip Johnson. I'm the chief
 5 executive officer at Leo J. Shapiro and Associates,
 6 which is a Chicago based market research and consulting
 7 company.
 8 Q. Do you live in Chicago?
 9 A. I live in Seattle, actually, but I used to
 10 live in Chicago.
 11 Q. What do you do for a living at Leo Shapiro?
 12 A. Well, in addition to my administrative
 13 responsibility I'm also a project director. In other
 14 words, I design and conduct primary market research in
 15 consulting studies for various clients.
 16 Q. And are you here today to tell us the results
 17 of the survey you did over the last two weeks relating
 18 to any likelihood of consumer confusion with respect to
 19 the SAME with sugar package?
 20 A. Yes, I am.
 21 Q. Before we get to that, go through your
 22 Education background for the Court.
 23 A. Certainly. I have a B.S. degree in Psychology
 24 from Loyola University in Chicago, and I have a masters
 25 in Business Administration from the University of

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1 Q. How long have you been president and C.E.O. at
 2 Leo Shapiro?
 3 A. I was president about ten years ago. I think
 4 I have been C.E.O. for the last four.
 5 Q. In general terms, what does Leo Shapiro
 6 provide to its clients?
 7 A. We conduct primary market research studies
 8 that focus on consumer behavior. Most of our clients
 9 are retailers and other people who want to know what
 10 consumers think of them, how they buy products and
 11 services from them in order that they can compete more
 12 effectively than their competitor.
 13 And then personally I have for the last 15
 14 years been involved. I spend about half my time in
 15 studies related to litigation, like the matter here.
 16 Q. What types of surveys do you conduct?
 17 A. We conduct personal interviews, we conduct
 18 telephone interviews, we conduct Internet interviews,
 19 focus groups. Every kind of traditional and some of
 20 the cutting edge survey techniques we use.
 21 Q. What are these different types of surveys
 22 measure?
 23 A. They all measure consumer beliefs or attitudes
 24 or behavior or all of the above.
 25 Q. Can you ballpark for me how many surveys you

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1 Chicago Graduate School of Business.
 2 Q. After completing your education, where did you
 3 work?
 4 A. I started working at Leo Shapiro and
 5 Associates actually when I was in undergraduate. It's
 6 the first and only job I ever had. I got a part time
 7 job there while I was still in school, and what I did
 8 was coded surveys, which is, once they are filled out
 9 they had to be coded so you could make sense out of
 10 them. And I stayed there. It's the only place I have
 11 ever worked.
 12 Q. How many years you have been there?
 13 A. Thirty-three years.
 14 Q. How many employees does Leo Shapiro have?
 15 A. We have 100 employees, roughly.
 16 Q. What positions have you held since you were
 17 the survey coder, if you will?
 18 A. I started off coding and then I got a job
 19 there that was full time. And first I was an
 20 assistant, which means I actually did interviewing.
 21 Then later I learned how to design interviews. And I
 22 conducted them. I was a junior analyst for a while and
 23 a senior analyst and project director. Eventually I
 24 became vice president and subsequently president and
 25 C.E.O.

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1 have worked on?
 2 A. I've designed and conducted hundreds of
 3 surveys.
 4 Q. Are there also surveys that you have
 5 supervised that you didn't design and conduct yourself?
 6 A. A long time ago. But in the last twenty years
 7 the surveys that I am involved in are the ones that I
 8 designed.
 9 Q. How many surveys have you prepared in the
 10 litigation context like this?
 11 A. I have done a few hundred.
 12 Q. How many times have you been certified to
 13 testify as an expert witness on surveys in federal or
 14 state court?
 15 A. I believe about 70 times.
 16 Q. Have you ever been prevented or excluded from
 17 testifying based on your credential in a courtroom?
 18 A. No, I have not.
 19 Q. Are marketing and consumer surveys that you
 20 might do for a brand awareness for a company different
 21 than litigation surveys?
 22 A. Well, I think they are different. You saw
 23 examples of them and we all did yesterday. In one of
 24 the ways they are different is the complexity. As you
 25 saw, they had a 17-page questionnaire with literally

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1 hundreds and hundreds of questions that a respondent
2 could would down and fill out. Those are not used in
3 litigation.

4 The kinds of surveys that the Dr. Mazis
5 testified about earlier that he conducted and sort of I
6 conducted are typically the kinds of surveys. They are
7 done for a specific purpose with a very specific focus.

8 Q. What are the focuses or the areas of which you
9 have done prior surveys for litigation, subject
10 matters?

11 A. The subject matters generally have to do with
12 intellectual property in Lanham Act issues, generally
13 the issues like secondary meaning, likelihood of
14 confusion, genericness; and then to a lesser extent,
15 false advertising, different kinds of advertising
16 claims: change of venue, unfair competition, and some
17 lesser things.

18 Q. Does Leo Shapiro or you always have one side
19 you represent in these sort of survey cases?

20 A. No. I have done about --- about half my work
21 is for plaintiffs and about half for defendants.

22 Q. Did you prepare an expert report in connection
23 with this case?

24 A. I prepared a declaration which summarizes the
25 study that I conducted.

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1 MR. ZALESIN: No objection.

2 THE COURT: Very well. He seems to be a
3 expert qualified.

4 BY MR. LOCASCIO:

5 Q. I'd like to talk to you, Mr. Johnson, about
6 how you started being involved in this case. Why don't
7 you tell me what you first heard about the case, who it
8 was from, and some of that background.

9 A. Well, I guess it was about two weeks ago I
10 received a call from one of your colleagues in Chicago,
11 Russ Weisman. And I believe you joined him on the
12 telephone during that conversation and explained to me
13 that you had a situation here where you thought you
14 should conduct a survey.

15 Q. Did anyone tell you what the goals of the
16 survey were or what your were supposed to find during
17 any of the conversations that you had?

18 A. Well, it was explained to me what the tissue
19 was.

20 Q. What was that?

21 A. The issue, as I understood it is whether or
22 not the use of the package on the new SAME with sugar
23 product was likely to cause consumer confusion here in
24 the marketplace in Puerto Rico such that people would
25 believe it was SPLENDIA or came from SPLENDIA.

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1 MR. LOCASCIO: I'm going to go ahead and hand
2 you Defendant Exhibit MM, which has your C.V. at the
3 back because your expert information is on the front.

4 (Document handed to defense, the witness,
5 and the
6 Court.)

7 BY MR. LOCASCIO:

8 Q. At the back of Defendant Exhibit MM, is that
9 your C.V. and resume?

10 A. Yes, I have a C.V. and a case list that covers
11 the more recent cases.

12 Q. Are you member of any professional
13 organizations or association?

14 A. Yes, I am. I'm a member of the International
15 Trademark Association, the American Marketing
16 Association, the A.A.P.O.R., which the American
17 Association of Public Opinion Researchers.

18 Q. Have you done any writing or lecturing?

19 A. I've given a number of lectures at different
20 International Trademark Association functions, A.B.A.
21 functions, some C.L.E. class on surveys.

22 MR. LOCASCIO: At this time, Your Honor, we
23 tender Philip Johnson as an expert on use of survey and
24 research for consumer behavior opinion and state of
25 mind.

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1 Q. Was this situation looking into the possible
2 likelihood of confusion between two products something
3 you have done before?

4 A. Yes, many times.

5 Q. Did you use that experience in preparing your
6 survey in this case?

7 A. Yes, I have.

8 Q. I'd like to walk through the process of how
9 you designed your survey questionnaire. Would it help
10 you to have a questionnaire in front of you for this?

11 A. Yes it would.

12 MR. LOCASCIO: I'll go ahead and hand up to
13 the witness what's been marked as Defendant's NN.

14 (Document handed to the witness and to
15 the Court.)

16 Q. Mr. Johnson, the Exhibit NN, has got two
17 parts. The first half is in English, the second half
18 is in Spanish. Maybe you could tackle that first one
19 and we'll know what we need to go through on this
20 document. Can you explain that?

21 A. The first part is the English version and the
22 second part is the Spanish version. We prepared two
23 versions, which I do whenever you deal in a marketplace
24 where there is a language difference, and then we give
25 respondents a choice of whether they would like to

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- 1 conduct the survey in English or Spanish.
- 2 Q. And you have them translated?
- 3 A. I do.
- 4 Q. And you're comfortable that it's an accurate
- 5 translation?
- 6 A. Yes.
- 7 (Publishing.)
- 8 Q. I'll put your survey up on the screen. I know
- 9 you've got one. It's probably a little easier to read
- 10 than the screen version.
- 11 Let's talk about who gets asked the survey.
- 12 Who do you look at when you design a survey
- 13 like this? In this case, who was the universe of
- 14 people you wanted to talk to?
- 15 A. Well, one of the things you do whenever you
- 16 design a survey is you first think about who is the
- 17 relevant universe. So the relevant universe, my
- 18 understanding, are people here in Puerto Rico who
- 19 purchase sugar substitutes for themselves or someone
- 20 else in their household. So those would be the people
- 21 you would want to conduct the interview with.
- 22 Q. You were here when Dr. Mazis talked about the
- 23 screener question and things like that. Do you
- 24 remember that?
- 25 A. I do.

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- 1 So when you're in shopping centers which if
- 2 it's a rainy day you may well get other people like
- 3 myself into the mall. I don't want to talk to them. I
- 4 want to talk to people who live here.
- 5 So that's part of the screening. And we had a
- 6 number of other questions which are similar to Dr.
- 7 Mazis's.
- 8 Q. Okay. At some point it looks like Question 3
- 9 relates to what language you wanted to do the survey
- 10 in?
- 11 A. That's correct. "Do you prefer to complete
- 12 the survey in Spanish or English?"
- 13 And then we had the questions about
- 14 purchasing.
- 15 And then we have what we call the "security
- 16 screens" in terms of participating in market research
- 17 surveys in the past three months, as well as members in
- 18 your household.
- 19 And then finally whether or not they wear eye
- 20 glasses or contact lenses and whether they have them,
- 21 because otherwise we wouldn't want to show them
- 22 something that required visual acuity.
- 23 Q. At the time you get through all of those
- 24 screener questions, what happens then?
- 25 A. Well, then you tell the person you would like.

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- 1 Q. I don't think he indicated a big disagreement
- 2 about that. Am I correct that you don't have a lot of
- 3 disagreement about the need to screen out some people
- 4 before you start the survey?
- 5 A. No, the screening approach and the approach to
- 6 qualify the respondent, get the right person, is
- 7 something that's fairly well accepted. And I think
- 8 fairly what Dr. Mazis testified earlier, we both follow
- 9 the similar pattern in terms of the screening and the
- 10 qualifying question of having purchased a sugar
- 11 substitute in the past 90 days and also planning to
- 12 purchase.
- 13 Q. We can stop from the stop, the screening
- 14 section of your survey. The first question, "What is
- 15 your age?"
- 16 Why was that question in the survey?
- 17 A. Well, you set certain parameters when you're
- 18 interviewing. In this case it was to deal with adults
- 19 over 21, because my understanding of the sugar
- 20 substitute market is that it's primarily an adult
- 21 market.
- 22 We wanted residents of Puerto Rico, especially
- 23 this time of the year, because my understanding and
- 24 certainly from the hotels in town, there are a lot of
- 25 tourists in town.

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- 1 to interview them and you take them usually to an
- 2 area -- these are done in shopping centers. These were
- 3 done in three shopping centers in the greater San Juan
- 4 area where there is an interviewing area set aside so
- 5 it's not so distracting, it's being in the flow of
- 6 things.
- 7 So you take the person who qualified, you
- 8 bring them into the interviewing area and then you
- 9 conduct the interview with them.
- 10 Q. Can you tell me your involvement in the
- 11 process of these interviews, arranging for them or
- 12 otherwise finding out what was going on during that
- 13 process?
- 14 A. Well, I have a field research organization
- 15 called "Survey Center," which is part of my company.
- 16 In other words Leo Shapiro and Associates, Survey
- 17 Center is a wholly-owned subsidiary.
- 18 They are responsible for the field work. They
- 19 contacted a local field organization called "C.R.C."
- 20 Consumer Research Center. They in turn supplied the
- 21 interviewers. They screen interviewers. They are a
- 22 member of the Market Research Association. They are a
- 23 reputable supplier of this kind of service. They do
- 24 the actual conduct of the interviews. And it was done
- 25 at 3 major shopping centers within the San Juan area.

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1 Q. Was someone from your group involved in the
2 process of actually training these people or working
3 with them?
4 A. I had a liaison member from my many office
5 come here and work with them, yes.
6 Q. What's the time period over which your survey
7 was conducted?
8 A. Without the benefit of a calendar, it would
9 have been the Monday to Friday of have last week.
10 Q. You mentioned the survey that you were setting
11 out to do in this case to determine if there is a
12 likelihood of confusion, and that confusion -- am I
13 right -- is with the SPLENDIA product that is the
14 plaintiffs'?

15 A. That's what's alleged, yes.
16 Q. That's what you want to check, find out the
17 answer to?
18 A. Yeah, that's the disagreement or the dispute.
19 Q. Because the survey is about confusion with
20 SPLENDIA, would you just use SPLENDIA in the survey?
21 Would you show people SPLENDIA?
22 A. No.
23 Q. Why not?
24 A. Because there is no point in showing SPLENDIA.
25 The times you would show SPLENDIA is if you

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1 someone and you take it away and you find out if they
2 are confused about who put it out.
3 Q. After the survey is conducted, what happens
4 next?
5 A. Well, you take the results of the survey. In
6 this case you first translate them so they can be
7 processed. You validate them by telephone, using
8 telephone calls.
9 We had an organization in Texas who was
10 bilingual who actually did the telephone calls, so
11 you're working with a different group.
12 You never use the same group to check the work
13 that you have do the work. So we had the validations
14 done from Texas with the people here. They actually
15 telephone the respondents in the survey, verify that
16 they, in fact, participated in the survey. Then you go
17 ahead and process the data by putting them into a
18 computer and producing summary tables so that I can
19 tell what we found out.
20 Q. Why do you use a different person to check
21 whether the surveys were done than the person who
22 conducted the surveys?
23 A. It's the standard practice, because when one
24 group does something, you always have another group
25 check their work. It's the intelligent, way to do

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1 were doing a secondary meaning study, you would show
2 some form of SPLENDIA, in other words, the part of
3 SPLENDIA that you believe had secondary meaning.
4 But you wouldn't show it in a likelihood of
5 confusion survey because it is the known brand, in
6 other words, the one that would be in consumer's minds
7 that would cause the confusion, because that's what
8 they are thinking of. So you wouldn't show it to them,
9 because that would prompt them or prime them before you
10 would conduct the study.
11 Q. Can you explain to me if there are any
12 particular types of survey techniques such as -- I take
13 it that's not one you would do. But are there
14 appropriate types of ways to survey for confusion or
15 secondary meaning?
16 A. There are general methodologies used in
17 likelihood of confusion studies. The most prominent is
18 based on what we call the "Ever Ready test, which is
19 also described as monadic test.
20 Q. What does that mean?
21 A. "Monadic" means you're showing one stimulus to
22 a respondent; ergo, monadic.
23 So an Every Ready test basically is designed
24 to show the junior user or alleged infringer, or
25 however you want to describe that. You show it to

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1 this.
2 Q. Did you call every one of the participants?
3 A. I think had we ended up actually reaching
4 about 43 percent, which given the amount of time we had
5 to do it is a very high number. Typically you would
6 only contact 10 percent or less.
7 Q. When you do that, was there anyone in this
8 survey that said that's not me, I didn't say it,
9 something like when you called them up after you
10 validated?
11 A. Yes, five interviews failed in the validation
12 process out of the 827, because we did 827 respondents
13 in three areas. Five did not acknowledge that they
14 actually participated in the survey. So we removed
15 those five from the data base.
16 Q. In your experience, is that a high number?
17 A. No, it's very normal. And it comes about
18 because people don't want to be bothered again. They
19 already participated in the survey one time. They are
20 afraid you're trying to sell them something or do
21 another survey with them.
22 Q. Then they say 'it wasn't me'?
23 A. Wasn't me.
24 Q. What else do you do when prepare the survey?
25 Say you've got the screener questionnaire done. What

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1 happens next?

2 A. In terms of designing the survey?

3 Q. Yes.

4 A. Well, I design the survey so that based on my
5 understandings of the case so that it's consistent with
6 my experience in whether Court's have suggested are the
7 best practices.

8 We do what we call the "generally accepted
9 practices," which are the waves that have evolved over
10 the last 20 years.

11 I mean, the Every Ready test, for example, was
12 ancient history. It was one of the original designs.
13 So it inspired a certain technique. But it's by no
14 means still accepted as current. For example, the
15 language in it has been criticized many, many times for
16 being leading and for being not balanced in terms of
17 the form of the questions that were in that study.

18 So using what has been accepted most recently,
19 these have evolved over time. And that's what I do.

20 Q. Let me bring your attention back to Defendant
21 Exhibit NN, which this is now the survey part of the
22 questionnaire. This is page 3.

23 Can you tell me happens when the survey
24 participants shows up? They've gone through the
25 screener and now its's time to start the survey. What

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1 But these numbers are picked at random to have
2 no meaning. You use two letters because if you use
3 something like A, B, C or 1, 2, 3, respondents attach
4 some significance to that. So if they see it, they are
5 going to say, 'Oh, this is product A and this a brand
6 X.' It means something to them.

7 So you pick a way of labeling this so the
8 interviewer can label what they are doing. 'I'm going
9 to do this questionnaire with TT and I mark it.' And
10 that's what I've done.

11 Q. And so with your survey the questioner checks
12 off the letter code that matches the box they are
13 handing a interviewee, if you will?

14 A. Right. And questionnaire is always the same.
15 It will be marked either DD or TT.

16 Q. Is that how you tell which person is seeing
17 which box?

18 A. That's correct.

19 Q. One box is the SAME with sugar box in yellow.
20 Which size is that? There are three sizes of that box.

21 A. This is the one 100 packet size.

22 Q. And why did you choose had box as the as the
23 test?

24 A. Well, it's my understanding that this is the
25 most common size package sold. In other words, it's

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1 do they experience?

2 A. They are going to be handed a box. In this
3 case, one of two boxes. It will either be in the test
4 cell or the control cell. And we randomize that. In
5 other words, the first person through the door will be
6 test and the next person will be control and the next
7 person is test. And in between them you hide the boxes
8 so nobody can see anything to do with colors or
9 anything to do with what you're showing them so that
10 there is no information for them.

11 First, you hand them a box. The boxes would
12 be marked either -- we always pick a marking that
13 doesn't mean anything. In this case I believe they
14 were DD or TT, which is --

15 Q. Would it help you to see the boxes for the
16 survey?

17 A. Certainly.

18 MR. LOCASCIO: Can I approach, Your Honor?

19 (Two boxes were given to the witness)

20 A. So this box is marked on the end with a
21 sticker that says "TT," and this box is marked with a
22 sticker that says "DD." And the sticker is placed as
23 best we can over an area of the box that doesn't cover
24 anything, so we are not removing any information by
25 putting a label on it.

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1 the one with the most sales -- the most popular package
2 size, which is typically what is used.

3 Q. And the SAME with sugar in the 200 pack is a
4 bigger box that's actually different in size than
5 SPLENDIA, but you didn't choose that you; you chose the
6 100 box. Right?

7 A. That's correct. You want to pick what's the
8 most normal thing for the consumer.

9 Q. And then the other you have, what's that?

10 A. This is the SUGAR TWIN box, which is also in
11 the 100 count.

12 Q. What is that box? In the course of your
13 survey, what does it do?

14 A. This is what we call a "control." So if this
15 is the test product, the one I want to find out if this
16 causes confusion. You need to pick a control product
17 to decide whether or not you're really measuring
18 confusion or if you're just measuring noise or error.

19 Q. Why did you use a box of SUGAR TWIN?

20 A. Well, SUGAR TWIN has a the attributes of a
21 good control.

22 Q. What are those?

23 A. Well, first of all, it's a real product. It's
24 not a made up thing. So it's always better to use
25 something real, if you can. It's not well known, is my

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1 understanding, at least here Puerto Rico. That's
2 important because if you had a really well-known
3 product and people recognized it, then it would have
4 its own brand share mentioned.

5 So, pretty much, you're not going to have
6 people recognizing it because it's popular, so you
7 don't have a lot of brand share mentions to deal with.

8 And it has the same general elements as the
9 test package, which is also important, because elements
10 that are common to genre are important to represent in
11 the control. So if many or all or some, like the
12 coffee cup or a glass, as I understand it from looking
13 at it and from the testimony yesterday and this
14 morning, many of them do, then you would want that in
15 the control.

16 And then finally it has a color that's not
17 infringing, but it's not wildly different. Because if
18 this is a color that's normal -- and, again, you saw it
19 yesterday and today -- if DOMINO uses a color like this
20 and SUGAR TWIN uses a color like this, and in the shelf
21 pictures we see of a grocery store, you see colors like
22 this typically on the shelf, then the control should
23 have that because it sets sort of the base level that
24 you want to know, well, if there is a little confusion
25 out there and it's caused by color, and that's not at

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1 please take a look at this as if you were considering
2 purchasing a sugar substitute like this and then let me
3 know when you're finished.'

4 You always want to talk to people about
5 purchasing, because you want them to be looking at it
6 as though they were considering purchasing it. You
7 don't want them to be an expert like you're an ad
8 agency and you want them to have a comment on the
9 colors or the design. It has to be in the frame of
10 mind of the purchaser, because that's something in the
11 Lanham Act that has to be specified.

12 Q. You mentioned you handed that sometimes facing
13 one way and sometimes the other. What was the reason
14 for that? How did you know which way to hand it to
15 people?

16 A. We just randomized it. We just alternated,
17 because it's a variable. I mean, we bought these
18 packages in Puerto Rico. So this is how they are
19 really sold. So rather than always assume they stock
20 the shelf exactly the same way, we just randomized how
21 we did it so people could flip it around.

22 Q. How many boxes of product do you need to do
23 one of these surveys?

24 A. I think we had about two dozen of each box,
25 because they get handled. So you can't use them

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1 issue, because that's what the market standard is, you
2 want to know how much higher than that or lower this
3 package would be.

4 So you need something that sets a bench mark
5 when you pick a control.

6 Q. Did you create the questions and the
7 instructions to the survey yourself?

8 A. Yes, I did.

9 Q. Did anybody from my firm or any other law firm
10 tell you what those questions should say?

11 A. No.

12 Q. Let's start with the instructions that you're
13 given in your service. It's on page 3. Can you tell me
14 what the instructions and why those are important?

15 A. Well, you start by putting people into a
16 buying frame of mind. So we hand them this product,
17 and we tell them -- we also, by the way, we alternated
18 on this product whether we handed it to them with the
19 English side or the Spanish side on the made with sure,
20 just so we randomized it.

21 So the first thing is you randomize how you
22 hand it to someone. And then you tell them 'this is a
23 sugar substitute package you might see if you were out
24 shopping at a food store or some other place that sells
25 this kind of product. And then, very importantly,

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1 infinitely.

2 Q. Were the SUGAR TWIN boxes bought in Puerto
3 Rico, also?

4 A. Yes, they were purchased here.

5 Q. You have handed it to the interviewee and
6 you've asked them to look at it as if they were
7 considering a purchase. What happens next?

8 A. After they are done, they hand it back to you,
9 and you put it away out of sight. And you do put it
10 away out of sight so there are no visual cues left for
11 the respondent to react to. So there is no color
12 issue. You have a white questionnaire. There is
13 nothing about the products that you have shown them
14 that would give them any hints in terms of how they
15 would answer subsequently.

16 Q. And then what do you ask? Let me actually
17 take a step back. Are there any other instructions you
18 give?

19 A. Yes. Then you give them the admonishment of
20 'If you don't know the answer to any of the questions,
21 it is okay to say so.' And then we also instruct them
22 'Please do not guess.'

23 Q. Why do you include the please do not guess
24 instruction?

25 A. Please do not guess is considered to be an

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1 important instruction in a survey like this where the
2 consumer is trying to be helpful. They are giving you
3 their time to do the survey. They know it's important
4 or you wouldn't be asking them the question. So they
5 are going to have a tendency to be helpful and try to
6 answer the question, which means often they will guess.

7 So you admonish them not to guess. But they
8 still are going to have some guessing in the survey.

9 Q. I notice there is instruction before that that
10 says 'If you don't know the answer, it's okay to say
11 no.' But then you follow that up with 'please do not
12 guess.'

13 Is that duplicative or is there a difference?

14 A. There is a difference between saying you don't
15 know something and telling people not to guess. So
16 they may not know the answer to a particular question.
17 But the 'know not guess' is a different kind of
18 instruction.

19 Q. In your experience, is that an important thing
20 to include in the survey?

21 A. Yes.

22 Q. So then the first question of your survey, can
23 you go through that and why you put that question in
24 there?

25 A. This is the question that we typically refer

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1 and there has been a lot of talk -- and you heard it
2 this morning when Dr. Mazis talked about it. The
3 Court's have insisted on the fairness overruling the
4 unfriendliness.

5 So you try to make it as clear as you can and
6 concise as you can. But in fairness, the reason for
7 you say 'do you or don't you,' for example, is called a
8 'balanced question.' So it's not suggesting you must
9 have a view. It's saying do you or don't you;
10 otherwise, you're encouraging or leading the
11 respondent.

12 The same way when you say you know who or what
13 brand or company. If you just say who, they not know
14 what you're talking about. If you just say what brand,
15 they may think about as a company.

16 If you don't give them all of those choices,
17 again, you're limiting some people's ability to
18 respond.

19 When you say makes or puts out, it clarifies
20 what you mean, because some people might understand
21 manufacturing or just that you ship it or you pack it.

22 So these are changes to the original Ever
23 Ready questions of 15 years ago that are the
24 well-accepted changes that are very common and the ones
25 I use and other people who practice this sort of survey

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1 to as the 'source confusion question in an Ever Ready
2 survey,' which is, "Based on what you just saw, do you
3 or don't you know who or what brand or company makes or
4 puts out the sugar substitute that I showed you?"

5 And then people can say, 'no, I do not,' or
6 'no, I don't,' or, 'yes, I do,' or they can say 'no
7 opinion.'

8 And if they say yes, we ask them 'Who or what
9 brand or company do you believe makes or puts out the
10 sugar substitute that I showed you?'

11 And then we probe them any others. And then
12 we ask, 'What makes you say that irrespectively?' So
13 what makes you say that to the response they gave in 18
14 makes or puts out the sugar substitute that I showed
15 you.

16 So we find out who they are thinking of and we
17 find out why they are thinking. So it's all their
18 words, not mine.

19 Q. We heard McNeil's expert talk about this
20 question and say that it was not the appropriate sort
21 of question to ask like in a confusion survey. Can you
22 address that point?

23 A. Well, it is the exact question you're supposed
24 to ask in a likelihood of confusion survey. And it's
25 the wording -- if the wording is consumer unfriendly --

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1 generally do use.

2 Q. According to Dr. Mais, you could have taken
3 out perhaps something with an "or." So you might have
4 what company but not what brand or company.

5 What impact would that have if you gave them
6 less choices there but it might be able to short a
7 question?

8 A. It would have been a shorter question, but it
9 would have been more limited in what people would
10 understand and what they would say.

11 Q. Why is that with respect to brand or company?

12 A. Well, some people know the brand of something
13 but they don't know who makes it. Other people know
14 who makes it. The brands run across things.

15 Q. In response to this question, there are three
16 answers. And then if they say yes, you then follow up.
17 Right?

18 A. Yes, you find out what they are thinking.

19 Q. This question is designed to focus on the
20 focus of the product; correct?

21 It sounded like Dr. Mazis said, 'well, more
22 people should have said SAME when you showed them this
23 question.

24 Can you talk about that a little bit?

25 A. Well, I thought the results were quite

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1 rational in the sense that they shouldn't really have
2 been familiar with any either one of these packages.

3 My understanding was this was very new on the
4 market here when we conducted the survey. And this,
5 while it's being offered here for sale, only has --
6 what did they say -- 1 percent or one-tenth of a
7 percent of the market here.

8 So they shouldn't necessarily be intimate with
9 these products. You wouldn't them to react to that
10 they actually know who makes these or puts them out.

11 Q. Why didn't you just ask people 'what did I
12 just show you?'

13 You were here a moment ago with Dr. Mazis and
14 it sounded like there was some commentary of 'How could
15 people possibly forget what you showed them three
16 seconds ago?'

17 Why don't you just ask the people 'What did I
18 just show you?'

19 A. Well, if you ask them 'What was the brand,'
20 for example, if we did it, as you did from the stand of
21 reading this, if I get people merely to read me back
22 what I showed them, which is SAME, and they say that,
23 what it causes is what we call a "funneling or
24 tunneling effect". Then to get them to say anything
25 else, like SPLENDIA, is going to be greatly diminished,

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1 manufacturer.'

2 Q. That language 'related to, sponsored by, or
3 associated with' seems like -- couldn't you just
4 tighten that up and make it a little shorter?

5 A. No. Again, this is the problem with the
6 Lanham Act, again, and what Courts have asked you to
7 say, is consumers, again, if you do one of those three,
8 you're limiting their choices.

9 By saying 'related to, sponsored by, or
10 associated with,' if they believe this is a line
11 extension of SPLENDIA, for example, they would answer
12 that it's SPLENDIA. If they believe SUGAR TWIN is a
13 line extension of SPLENDIA or SPLENDIA is a line
14 extension of SUGAR TWIN, they would give that kind of
15 an answer. Then they would say yes to this kind of
16 question worded this way. But then they don't have to
17 know the exact relationship.

18 Q. And then you probe to find out why people gave
19 those answers?

20 A. Yes. We want to know who first, who is it
21 that they are thinking of; and then what, what makes
22 them say that.

23 Q. When you determine the percentage of people
24 that associate the box in the survey with a particular
25 other company or brand, how do you calculate that based

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1 because you have focused them on the brand and not on
2 who makes it or whether they make other products that
3 you know of.

4 Q. The next question of your survey is on page 4,
5 and what is that question and what is the purpose of
6 it?

7 A. Well, first of all, it's important that this
8 sort of question is asked of everybody. Okay? I
9 didn't filter people out of the survey with my first
10 question. The first question has two parts, which is
11 correct, it's called a "filter" question to qualify
12 people so you don't force people to guess.

13 But the second question is asked of everybody.
14 It's not only asked of people who said yes to the first
15 question.

16 Q. So when Mr. Zalesin was talking to Dr. Mazis
17 and suggested that people who said they didn't know the
18 brand or company in the first question weren't ever
19 going to be asked anything else, that's not what the
20 survey does. Right?

21 A. No. The survey asks everybody the question
22 'Do you believe that whoever,' -- even if they don't
23 know, -- 'whoever makes or puts out the sugar
24 substitute I showed you is or is not related to,
25 sponsored by, or associated with any other brands or

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1 on these two questions?

2 A. Well, I take what we call the "net," which is
3 either question. In other words, you don't limit them.
4 You take, do they mention, for example, SPLENDIA to
5 Question 1, A, B, C, or do they mention it to Question
6 2, A, B, C.

7 So they have been asked twice. Everybody gets
8 asked twice. And if they said it in either place, you
9 count them as confused or not confused, depending on
10 what you are doing with it. But you collate or
11 consider the responses to both questions.

12 Q. I'm going to put on the screen. That's the
13 first. For your survey data did you compile the
14 information that you got?

15 A. Yes, I did.

16 Q. And after you get to the first question which
17 is 'Do you know who makes or puts out the product?'
18 You follow that up with who the source is. Right?

19 A. Yes.

20 Q. And then did you compile that into a chart
21 where you know who said SPLENDIA and why?

22 A. Yes.

23 Q. Can you go ahead now and fill in these numbers
24 for me from your expert report, or from your memory, if
25 you know.

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1 A. Actually, first, to get to the why he said
 2 SPLEND, you need the other chart. In other words,
 3 this is the Question 1C, which comes after 1A and B.
 4 Q. I'll show you that since that's probably the
 5 way they saw it when you do the survey.
 6 A. Yes, they saw it when they did the survey.
 7 That's the way it works if you were doing the survey.
 8 Q. Okay. So these are the questions they are
 9 asked. Right?
 10 A. That's correct.
 11 Q. And then resulting from these questions,
 12 people either say they know or don't know and then what
 13 the brand is. Correct?
 14 A. That's correct.
 15 Q. Can you walk through the data you got during
 16 your survey?
 17 A. Yes. So in terms of Question 1, A, B, the
 18 number of people who said, 'Yes, I have a belief,' and
 19 also said SPLEND when they were shown a package of
 20 SAME with sugar, was 4.1 percent.
 21 In the control cell to the right of that,
 22 among the people who saw this package of SUGAR TWIN and
 23 asked 'Do you have a belief,' 2.2 percent reported that
 24 it was or came from SPLEND.
 25 Q. And then there is a column after called

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1 "net." What is that?
 2 A. The net is when you look at them both; because
 3 some people would have said the same thing. In other
 4 words, you could have said SPLEND to Question 1 and
 5 you could have also said it again to Question 2. And
 6 some people in fact did.
 7 So when you take the net of saying it either
 8 place, you end up with a total of 24.9 percent who
 9 named SPLEND is either a source or associated or
 10 related or sponsored or is in way related to the SAME
 11 with sugar package.
 12 MR. LOCASCIO: My math is really off, Your
 13 Honor. I'm going to rewrite it out.
 14 I apologize, Mr. Johnson. That's why I'm the
 15 lawyer in the room and not the survey expert.
 16 Q. When you add them?
 17 A. 24.9 is the net. You were right.
 18 THE COURT: You were right.
 19 MR. LOCASCIO: We'll just go right back to
 20 that one, shall we?
 21 BY MR. LOCASCIO:
 22 Q. How about when we net SUGAR TWIN in the
 23 control cell?
 24 A. That would be 20.6.
 25 Q. Thank you.

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1 'Difference between test and control.' Can you explain
 2 to me what that is?
 3 A. Well, the reason for doing a control is it
 4 establishes a baseline; so we always subtract it from
 5 the test. That's the reason they call it a test and a
 6 control. It's a requirement when you do a study like
 7 this. So you subtract, for example, from 4.1 you would
 8 subtract you would subtract 2.2, which is something
 9 like 1.9.
 10 Q. What does that one 1.9 percent represent?
 11 A. Well, that would be for that question, the
 12 finding. In other words, you would assume that the
 13 source confusion is about 2 percent.
 14 Q. And that's based on the question you asked
 15 'How many people think SAME with sugar comes from the
 16 same source as SPLEND'?
 17 A. Correct.
 18 Q. The next line is 'relationship, sponsors or
 19 association.' Can you tell me the data your survey
 20 showed for that?
 21 A. Yes. There in response to that in the test
 22 sell, 22 percent named SPLEND; and in the control
 23 cell, I believe, 19.2 percent named SPLEND.
 24 So the difference there is about 2.8 percent.
 25 Q. And then there is another column that says

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1 A. And the difference would be 4.3, and that we
 2 can subtract directly.
 3 Q. Thank you for the math assistance. I
 4 appreciate that.
 5 And can you tell me what that means?
 6 A. That means that when we consider the questions
 7 about source and we also consider the questions about
 8 relationships, sponsorship, or association, when we
 9 compare the test with the control product and we use
 10 the control for a baseline, you would conclude that
 11 about 4 percent confusion would exist in the
 12 marketplace, if anything. The 4 percent is close
 13 enough to zero, so for most parts we consider it to be
 14 diminimus or zero.
 15 Q. Let me ask you this: If two products that one
 16 has one particular look and one has another, and then
 17 you get 24.9 percent for the test cell, why isn't that
 18 the amount of confusion?
 19 I think in opening statements -- I'm not sure
 20 if you were here -- I think you were -- Mr. Zalesin
 21 says you survey shows 24.9 percent or 25 percent of the
 22 people are confused. And I would like for you to
 23 address, that please.
 24 A. Well, that isn't a measure of confusion.
 25 Remember, what we are dealing with here in both Mr.

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1 Mazis' survey and mine, is a market research survey.
2 And you've got to remember that surveys are not -- we
3 are not witnessing purchasing where people are taking
4 things and being confused. They're a simulation. And
5 we put them together to try to make an accurate a
6 measurement as we can of what confusion exists.

7 So we are asking people questions that may
8 never occurred to them normally. And we are also
9 putting them in a situation where they are an expert
10 and they are trying to guess the question. And we know
11 there is a certain baseline. People do pick up their
12 own products, for example, just to get that clear. It
13 may not be because it's particularly confusing, but
14 it's that the average woman, for example, or a man, who
15 goes to a grocery store can pick up about 50 items in
16 about 20 minutes out of 24,000 S.K.U.'s in that grocery
17 store.

18 And they do it. It's a remarkable thing to
19 watch and to study, because they do it through a
20 process of first de-selecting and then selecting within
21 products. And they are very, very good at it.

22 But still in all, people make mistakes. So
23 there is a certain amount of mistakes made. And
24 between that and the way questions are asked and the
25 fact that you have people in a survey situation, which

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1 not infringing and they sought nothing to prevent this.
2 So if this is the base level, then I want to
3 know how different is this?

4 Q. When you said you heard testimony, were you
5 referring to Ms. Sandler saying that SUGAR TWIN looked
6 and felt different than the SPLENDIA package?

7 A. Yes.

8 Q. And she didn't believe that it was infringing.

9 A. Yes, that's correct.

10 (Publishing.)

11 Q. Let me show you what we put on the screen
12 before -- what will probably when I return to
13 Washington be less than popular -- the highlighting in
14 the Federal Judiciary Center's Reference Manual on
15 Scientific Evidence, that gives an instruction as to
16 how to perform a control group.

17 Was your control consistent with that
18 language?

19 "In designing a control group study the expert
20 should select a stimulus for the control group that
21 shares as many characteristics with the experimental
22 stimulus as possible with the key exception of the
23 characteristic whose influence is being assessed."

24 A. I believe that it is. That's what I attempt
25 to do, yes.

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1 is artificial, you always expect there is going to be
2 some error.

3 What you do when you design the survey in a
4 test and control is you use something real that exists
5 that is not infringing, and you say, 'Well, this is a
6 baseline for measuring error; so what I want to know is
7 how different is this.'

8 Q. There is also a fair amount debate in this
9 case as to whether that baseline is the right baseline.
10 I would like for you to explain why you believe that in
11 this case that's the appropriate control to subtract
12 out from your figure.

13 A. Well, as I said before, you want to pick
14 something that is as close to the product at issue, and
15 the product at issue in this case is --

16 Q. You don't need a SPLENDIA box?

17 A. Is the SPLENDIA box. In other words you want
18 something that's going to be in the market, sold along
19 side of this, 100 packets, and be non-infringing.

20 This is our base level. Whatever amount of
21 confusion you get for this in a survey is okay; it's
22 okay because the consumer experiences this every week
23 when they go into the grocery store. And it's not
24 prohibited by the Lanham Act. It's not prohibited.

25 I heard testimony yesterday this package is

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1 Q. And in this instance, as you understand this
2 case, what is the characteristic whose influence is
3 being assessed?

4 A. What's the difference is between SPLENDIA that
5 are set out -- and I believe you read them earlier --
6 that are set out as having or believed to be having
7 trademark significance. Which, again, you went through
8 this with Dr. Mazis and I don't think we have to go
9 through it again. But you point by point, they are not
10 present on the SUGAR TWIN box.

11 Q. When you got the data for SPLENDIA that we saw
12 on this chart, the people who said SPLENDIA to either
13 the test cells, SAME with sugar, or the control cell.
14 You then followed up with them by asking why they are
15 saying that. Right?

16 A. That's Correct.

17 Q. Can you go through the data for that?

18 A. I believe that in here, again, color is
19 important of those who named SPLENDIA in the test cell.
20 It's really 15.1 percent named SPLENDIA and said the
21 reason or one of the reasons -- because they could give
22 multiple reasons -- it was an open-ended question --
23 was color.

24 Q. Okay. 15.1?

25 A. 15.1, yes. 10.7 percent said it had something

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1 to do with the appearance of the box; 2.4 percent
2 reported it was because of the lettering or the
3 graphics or type style; and 8 percent said something
4 about familiarity with the product or the genre or
5 'it's the one I buy' or things like that.

6 Q. Anything else? Are there people who said
7 'other'?

8 A. There were a few mentions of 'other' and
9 'don't know,' but I don't know what those were offhand.

10 Q. I have those from your report. I believe.

11 A. Okay.

12 Q. How about when people saw the SUGAR TWIN box?

13 A. In the SUGAR TWIN cell you had 11.2 percent
14 who named SPLENDIA and said it was because of the color
15 of the SUGAR TWIN box; and 6.1 percent that it was
16 because of the appearance of the SUGAR TWIN box; and
17 3.2 percent because of the lettering or type style or
18 graphics; and 4.9 percent because of their familiarity.

19 Q. From your data, 1.7 were 'other,' and .5 were
20 'don't know.'

21 What does that data mean to you when you
22 compare the control cell results with the test cell?

23 A. First, you can see from the relative number of
24 mentions as well as sort of the order of magnitude
25 mentions, the reasons they said this box came from

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1 Q. There is a little bit higher number; correct?
2 it's not the same?

3 A. 4 percent. When you figure whether something
4 is significant, we generally think of it in terms of
5 the standard error or the confidence level. It's like
6 when you do an opinion pole or, let's say, voting for
7 president. What you're doing is you do a poll and you
8 say that the results are 90 percent plus or minus 5.
9 That's the confidence level.

10 The confidence level for data like this is
11 going to be 6 percent or above. In other words, the
12 error rate you would expect based on chance tends to be
13 6 percent or more for most of the data we are looking
14 at.

15 So this 4 percent would be lower than that,
16 which means for all practical purposes you treat it as
17 zero.

18 Q. Are there any other conclusions that you have
19 based on your work in this case?

20 A. I think it also means that when you look at
21 this turned around, it means that there is no secondary
22 meaning for the color yellow in terms of the
23 marketplace. In other words when a color tends to
24 identify exclusively one manufacturer, you don't get
25 the kind of mentions that you get in a survey like

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1 SPLENDIA were identical to the reasons they said this
2 box came from SPLENDIA.

3 Q. And what were those?

4 A. Primarily the color, more than anything, and
5 then the packaging, the graphics, familiarity.

6 Q. Does the second category 'packaging of box,'
7 which you do notice a higher number in the test cell
8 than the control cell, what does that indicate to you?

9 A. Well, remember, we had a 4 percent difference
10 between the test and the control cell. So you have
11 about a 4 percent difference in color; you have about a
12 4 percent difference in packaging; no difference in
13 lettering and graphics; and you have about a 3 percent
14 difference in familiarity. So they are in line with
15 one another.

16 Q. Based on data from your survey, do you have an
17 opinion as to the issue of likelihood of confusion
18 between SAME with sugar and SPLENDIA?

19 A. Yes.

20 Q. What is that opinion?

21 A. Well, according to the survey, the results are
22 very clear that there is no likelihood of confusion for
23 this package in terms of being likely to be confused
24 with SPLENDIA, any more than you would expect, just
25 based on the baseline in the marketplace.

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1 this.

2 This suggests that color is not-- the maybe
3 that this is yellow and SPLENDIA is yellow and people
4 know that, but it doesn't mean that everything yellow
5 is SPLENDIA or is SAME or is SUGAR TWIN.

6 Q. And in this marketplace with the did market
7 share that SPLENDIA has, am I correct that people may be
8 familiar with SPLENDIA's yellow product, but that
9 doesn't equal secondary meaning?

10 A. That's correct.

11 Q. Let me just ask you briefly if you have any
12 views or thoughts or opinions about the work Dr. Mazis
13 did in respect to the accuracy of his survey or the
14 validity of it.

15 A. I do have some opinions, yes.

16 Q. What are those?

17 A. I think the first thing that strikes you is
18 that instead of doing what one would normally do would
19 when you're doing a -- let's talk about design for a
20 second.

21 A design that has secondary meaning, which is
22 if we want to do sort of, let's say, the Paladino
23 approach, the difference between a Paladino and
24 non-Paladino secondary meaning survey is primarily
25 whether we attempt to ascertain whether a particular

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1 company owns the thing or whether it's one company or
2 more than company.

3 In other words, Mr. Paladino takes the
4 position that one company and more than a company is
5 sufficient. Others have said, 'Well, one company or
6 more than one company is the primary inquiry, but we
7 may also want to know who that is.'

8 Q. So these are back to the questions that we saw
9 with Dr. Mazis is the second question you just talked
10 about. He asked that; right?

11 A. Those are the questions of secondary meaning.
12 What he did on his survey is a, quote, first question,
13 the one that eliminated -- what -- half of the people
14 in the control group and some of the people in the test
15 group, is not found in secondary meaning surveys.

16 Q. What do you mean?

17 A. Well, it makes no sense to set up, for
18 example, a control in a secondary meaning survey that
19 doesn't exist.

20 Q. Would it help if you have these? I don't know
21 if you already do. It looks like you might.

22 A. I think I do.

23 Q. These are Plaintiff Exhibit 50, the white
24 control box; and Plaintiff 49 is the test box from Dr.
25 Mazis survey.

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1 the point of second secondary meaning. You don't have
2 to have bought it, for example, for something to have
3 secondary meaning. You could have seen it somewhere.
4 You may not even know where you have seen it. But you
5 have a belief or you don't have a belief.

6 Q. Do you have any other comments on the test
7 product or test package used by Dr. Mazis as to whether
8 or not it's appropriate?

9 A. Well, again, when you do -- it's very
10 difficult, first of all, to make a test package for
11 packaging that you use in a secondary meaning survey,
12 because you have to eliminate everything on here that
13 is not -- you have to keep the trade dress you want to
14 check, but you want to remove all the brand references.

15 So, for example, if this large X with the
16 serifs, the Roman feet, there is a type style to this
17 that mimics this with SPLENDIA; which is you have the
18 large and then the small. It's the same type face.
19 And it has these little serifs on it, and then it has
20 this swirl, like the NIKE swoosh.

21 And so we have this XXX with the swirl, and an
22 analyst is saying, 'well, can you guess what's in
23 there?'

24 That's really what you're asking the person
25 who is looking at it: Can you guess what name goes

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1 A. The reason for a control in any survey is to
2 measure error and noise for guessing. So if I know
3 this doesn't exist, why would I disqualify people in
4 the first question by showing them something that
5 doesn't exist, and then if they say it doesn't exist --
6 which is true -- I throw them all out of the survey and
7 don't ask them anything and don't count their answer?

8 Which is essentially what he did.

9 So when you're doing a secondary meaning
10 study, the question is 'does this or does this not
11 signify.' The primary significance of this is to tell
12 people who makes it and that it comes from a single
13 source. In other words, 'one person makes a box that
14 looks like this, and I know it's SPLENDIA because of
15 this look.'

16 That's secondary meaning.

17 Q. Is that what Dr. Mazis did?

18 A. Well, no, because first he screened out
19 everybody, and then you haven't even asked people that
20 inquiry, which is: Boxes like this, are they put out
21 by only one manufacturer or more than one manufacturer?

22 Instead, he had a question that had something
23 to do with, 'Have you seen or purchased,' which is
24 never seen before. And again their redundant. You're
25 either familiar with this or you're not. And that's

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1 there?

2 And that's not secondary meaning if I leave
3 the swoosh. And you have to decide what you're going
4 to leave on a package and what you're going to remove.

5 But they leave the slogan no-calorie sweetener
6 -- it's a slogan or the swoosh, the type font, the
7 positioning -- they have this little seal.

8 So it becomes difficult to say. But you
9 certainly have a lot on the package that's on this
10 package.

11 Q. No-calorie sweetener, that's one way you can
12 describe what the products in this market are, as sugar
13 substitutes; right?

14 A. Yes. I think there is calorie-free sweetener,
15 zero-calorie sweetener, no-calorie sweetener.

16 So SPLENDIA says no-calorie sweetener.

17 Q. And they use what they have on their actual
18 package.

19 A. Yes.

20 Q. Down in the corner there is that -- I think
21 Ms. Sandler called it a "seal." Looking at the box
22 that's handed to consumers or the survey participants,
23 can you see anything there in that X if you were to
24 look at this box, or is that wiped out of the source
25 information?

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1 A. I don't know if this is exactly what the
2 respondent saw, but you can see something in here. You
3 can see the blue where it says "made from." I can't
4 read -- tastes like. But you can see there is writing
5 under there. But I don't know if that's this copy or
6 of all copies.

7 Q. It looks like something is covered up there.

8 A. Yes.

9 Q. Anything else about the look of this product
10 or package, the test, versus the look of the control
11 that you think was inappropriate in the design of the
12 two packages?

13 A. Okay. Well, we just talked about the test
14 package so far. And like I say, that's a difficult
15 call because you have to decide whether things like the
16 swoosh should be on this package or not when you're
17 testing for secondary meaning; because if this is part
18 of the registered logo, for example, which I believe
19 yesterday it is, then it really shouldn't be here if
20 it's part of the registration, because then it's part
21 of the brand name.

22 This is difficult to deal with, because this
23 is a fictional product, for all intents and purposes;
24 but it has characteristics that are not found in the
25 marketplace for this sweetener. It has characteristics

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1 the marketplace in terms of what the common
2 characteristics are without having the infringing.

3 Q. One or two other questions.

4 Based on what you saw today about some of the
5 data compilations and some of the document survey
6 collection over recordation techniques used in Dr.
7 Mazis's survey, do you have any opinion as to whether
8 that's something you would rely upon or not?

9 A. Well, I heard, I think what we all heard, this
10 morning. But typically in Dr. Mazis -- before the
11 lunch break he did say what I think would say. For
12 example, I took the five interviews that didn't
13 validate. Even though I think they are legitimate
14 interviews, I didn't use them in the survey, because I
15 wouldn't want to report them to the party. Which is
16 what he said he should have done with the 37. Because
17 if have doubts about it, you just don't report them.
18 You don't assume something. So I would assume that you
19 wouldn't count them.

20 Q. So in your view they should be excluded from
21 the survey data?

22 A. In a sense you have them. They are marked one
23 way. Either you believe the marking or you believe the
24 color of the paper. And you've got to make a decision.
25 Or you can just get rid of them and then you wouldn't

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1 that tend to be shared by this sweetener rather than
2 this one.

3 Q. And your point, so the transcript is better on
4 that, it's more related to the EQUAL box than the
5 SPLEND box?

6 A. That's correct.

7 Q. Is there anything else about Dr. Mazis's
8 testimony or opinions that you take issue with?

9 A. Well, the notion of error in what he did and
10 the notion that he should only subtract 4 percent, for
11 example, the 4 percent SPLEND that you get to this
12 package. I don't know why anybody would say SPLEND to
13 this package, other than what we call sort of "random
14 guessing."

15 In other words, there are times you can hold
16 up three fingers and ask people and they will say
17 you've one up. That's the sort of guessing you measure
18 with a package like this. It does not measure noise
19 when you're trying to figure out what do people or
20 consumers believe in the marketplace.

21 Q. Dr. Mazis testified that that was all the
22 control was supposed to do. Is that your understanding
23 and your opinion, as well?

24 A. No, it's not. My understanding is a control
25 is supposed to take into account what is happening in

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1 be wrong. So the prudent thing to do is just not to
2 consider them.

3 Q. Looking at the screen, this is the chart I
4 showed Dr. Mazis. If the data for those miscoded
5 surveys is excluded, what does that do to Dr. Mazis's
6 results?

7 A. Well, first, it affects only the control
8 results, because it's only in the control cell. And
9 control results just show that what you have is in the
10 control cell for the white box you get about 71 percent
11 of the people guessing, even though they couldn't have
12 seen it, if they had seen it or purchased this product.
13 Which just says the error rate in this survey is higher
14 than 50 percent, which is extraordinarily high. And
15 usually a survey with an error that high, as he
16 testified in, I believe, the Ameritech case, you
17 wouldn't credit at all.

18 Q. And if those were coded properly and they were
19 really yellow boxes that were shown, the test case, and
20 it just happened to be put on white because, as you
21 remember, Dr. Mazis said maybe just the paper color
22 versions ran out, what would that do to his data?

23 A. It would just show that if you took out from
24 the test in the control all the people that were
25 guessing, you would have virtually no one left.

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1 MR. LOCASCIO: I'll go ahead and sticker that
2 as Exhibit AAA, and I'll hand those up to the courtroom
3 clerk.

4 BY MR. LOCASCIO:

5 Q. Mr. Johnson, just to conclude, based upon your
6 work in this case and the testimony you have heard in
7 over the past two days, what is your opinion as to
8 whether or not SAME with sugar is a likelihood of
9 confusion between that and SPLENDIA?

10 A. I don't believe that there is.

11 Q. Based on what you have heard do you have any
12 opinion as to whether or not the SPLENDIA trade dress at
13 issue in this case has secondary meaning?

14 A. I have an opinion, yes.

15 Q. What is that?

16 A. I believe it does not. In other words, I
17 believe what we are seeing is what you would expect,
18 that something with a 30-something percent market
19 share, if you show someone in sort of a yellow box with
20 lots of hints on it, people can correctly say that
21 SPLENDIA comes in a box that looks something like that,
22 as you would expect.

23 That is not a measure of secondary meaning.

24 Q. Even if secondary meaning had been shown in
25 some consumers because they are that familiar with the

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1 percent of the people who said 'I know that's
2 McDonald's because it's gold.'

3 And another with DeWalt, the maker of power
4 tools, who makes yellow and black power tools, where it
5 was 70, 80, 90 percent of the people in different -- I
6 did secondary meaning, likelihood of confusion,
7 post sale confusion. In a lot of different
8 circumstances they had extraordinarily high measures of
9 people who say 'just because of that I know it is the
10 DeWalt product.'

11 In my experience you need these very high
12 levels when it comes to color.

13 MR. LOCASCIO: No further questions, Your
14 Honor.

15 MR. ZALESIN: Your Honor, I am happy to
16 proceed. I would say in candor I probably have over an
17 hour of cross for Mr. Johnson. So its entirely up to
18 the Court.

19 THE COURT: Just go ahead.

20 MR. ZALESIN: Thank you.

21 CROSS-EXAMINATION

22 BY MR. ZALESIN:

23 Q. Good afternoon, Mr. Johnson.

24 A. Good afternoon.

25 Q. So we are clear, if you have no experience in

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1 SPLENDIA box and do believe it's only from one source,
2 how much of that do you understand in your opinion and
3 expertise is needed to actually show secondary meaning
4 under the Lanham Act?

5 A. In the situations I've been involved in were
6 surveys I've done --

7 MR. ZALESIN: Objection, Your Honor, this is a
8 illegal conclusion about the percentage that's required
9 to show secondary meaning under the Lanham Act. I
10 don't think we need testimony from Mr. Johnson on this.

11 MR. LOCASCIO: Well, the question is in his
12 experience what has he found and opine that it is
13 secondary meaning.

14 Dr. Mazis says a certain percentage he found
15 is secondary meaning. It would be interesting to know
16 what Mr. Johnson says about, particularly in light that
17 some of the issues as to whether his data is really as
18 high as it is claimed to be.

19 THE COURT: I think it's a factor, and he has
20 had the experience necessary.

21 A. In my experience, when it comes to color the
22 bar is set very high.

23 I've had a couple of cases I've been involved
24 in -- in fact, one is from McDonald's where we were
25 dealing with the golden arch where we had about 90

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1 academia. Is that right?

2 A. That's correct.

3 Q. And you have never worked for the Federal
4 Trade Commission. Is that correct?

5 A. I've conducted surveys that were used by the
6 Federal Trade Commission on a number of occasions.

7 Q. Where you were retained by the Federal Trade
8 Commission, or you have offered surveys in evidence
9 before the Federal Trade Commission?

10 A. Where I have offered surveys in evidence.

11 Q. I see. Have you ever been retained by or
12 employed by the Federal Trade Commission?

13 A. No, I have not.

14 Q. Have you ever worked for any other branch of
15 government?

16 A. Yes.

17 Q. What you done mostly in your career, Mr.
18 Johnson, is you have been an expert in litigation; is
19 that correct?

20 A. No, it's not.

21 Q. Do you agree with your own resume that's
22 attached to your expert report that your area of
23 expertise is the use of survey research as a tool in
24 litigation? Is that your area of expertise, sir?

25 A. That is an area of expertise yes.

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1 Q. That's the one you chose to highlight on your
2 curriculum vitae; is that right?

3 A. That is correct.

4 Q. In fact, according to your curriculum vitae
5 you have offered testimony regarding survey evidence on
6 over 50 occasions in both federal and state courts; is
7 that correct?

8 A. That is correct.

9 Q. And it says here, as you mention a moment ago,
10 you've offered survey evidence to the Federal Trade
11 Commission but not for the Federal Trade Commission;
12 correct?

13 A. I believe that's what I said.

14 Q. And I think if we count out the list in just
15 the last few years where you have testified, page 3
16 here, I came up with about 35 cases in which you have
17 testified just in the last few years. Does that sound
18 about right to you?

19 A. That sounds about right.

20 Q. And in addition to the 35 you have testified
21 in, I gather there are many, many more that you have
22 worked on where you haven't actually gotten to give
23 testimony; is that correct?

24 A. There are a number of them like that, yes.

25 Q. So when it comes to the use of survey research

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1 questionnaires are numbered sequentially; is that
2 right? In other words, there is a number assigned to
3 each of the 800 or so questionnaires; right?

4 A. I don't know if it's sequential, but we have a
5 number assigned to each one, yes.

6 Q. So there should be five missing; right?

7 A. There are five missing, right.

8 Q. Do you have any explanation why in fact there
9 are 15 missing?

10 A. No, except that, as I said, there is not a
11 sequence where every one -- there are numbered 001
12 through 8 something.

13 Q. And so some numbers are just randomly skipped
14 over? That's your testimony?

15 A. Some numbers are skipped over because they are
16 numbered as they come in. They are numbered in
17 batches.

18 Q. Did you personally number these, sir?

19 A. No, I did not.

20 Q. Again, you hired somebody else to do that for
21 you; right?

22 A. We have people who do that, yes.

23 Q. And you can't vouch for what they did.

24 A. I did not witness what they did.

25 Q. Now, let's talk about the questionnaire that

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1 as a tool in litigation and testifying, you're a pro at
2 it; correct?

3 A. I am an expert witness on the matter of survey
4 research, yes.

5 Q. Did you personally conduct the interviews in
6 the survey that you commissioned or you supervised in
7 this case?

8 A. No, I do not personally conduct the interviews
9 in these cases.

10 Q. You hired a field service to do it for you;
11 correct?

12 A. That is correct.

13 Q. Can you personally vouch for the work of every
14 single interviewer?

15 A. I believe that the work was correctly done. I
16 cannot vouch for them in the sense that I witnessed
17 what they did.

18 Q. Just like Professor Mazis can't vouch for the
19 work that the survey interviewers did in his survey?

20 A. I believe that's true, yes.

21 Q. You said that you had five interviews that you
22 had to pull out due to validation problems, that is,
23 the interview didn't validate; is that right?

24 A. That's correct.

25 Q. And all your interviews, all your

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1 you used for your survey. You said that your confusion
2 survey is a classic Every Ready design survey; is that
3 correct?

4 A. I said it's based on the classic Ever Ready
5 design, but it is modified and updated based on the
6 generally accepted practices used today.

7 Q. New and improved; right?

8 A. It's what is currently used by myself and
9 other people.

10 Q. You're someone who does a lot of this work for
11 litigation. You're quite familiar with the Every Ready
12 methodology; is that correct?

13 A. Yes, I am.

14 Q. And I take it you're familiar with a treatise
15 on trademark law called McCarthy? Would that be
16 correct?

17 A. That would be correct.

18 Q. And you would agree with Mr. McCarthy that a
19 now standard format used to prove likely confusion in
20 cases where plaintiff makes some products which
21 defendant does not is the Ever Ready format. We agree
22 with that; right?

23 A. Yes, we saw this earlier.

24 Q. And you would agree that these questions which
25 are set out in the McCarthy treatise are the ones that

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1 were used in the Every Ready case; right?

2 A. I would agree that that was what was used

3 there, yes.

4 Q. And we saw this before, but actually before we

5 get to the specific questions, let's just talk a little

6 bit about the introduction that you gave respondents.

7 You testified about this on direct. You said

8 you told them if you don't know the answer that that's

9 okay, don't guess, et cetera. Do you remember that

10 testimony?

11 A. I do.

12 Q. So for example, in Professor Mazis's survey,

13 Professor Mazis said to the respondent: There are no

14 right or wrong answers to my questions. I just want to

15 know what you think and what opinion you might have.

16 If you don't have opinion or don't know an answer,

17 please just tell me. Your responses will be completely

18 confidential. So please just tell me what you think.

19 Do you have any problem with that?

20 A. In what sense?

21 Q. You think that's a fair set of instructions to

22 give to your respondents in a survey at the beginning

23 of a survey?

24 A. It's a reasonable instruction, but it doesn't

25 say anything about guessing.

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1 Q. Well, it says: If you don't have an opinion

2 or if you don't know, just tell me.

3 But it doesn't mention guessing. That's your

4 point?

5 A. Well, my point is it doesn't say anything

6 about guessing.

7 Q. And he gives this set of instruction before he

8 shows the package to the respondent. Do you see that?

9 So after he gives that instruction, then he says here

10 is a package of no-calorie sweetener, et cetera. Do

11 you see that?

12 A. I see that.

13 Q. And that's pretty standard; right?

14 A. Yes.

15 Q. In your survey you gave the respondents the

16 package first; right? 'This is a sugar substitute that

17 you might see if you were out shopping at food stores,

18 et cetera. Please look at it as if you were

19 considering it for purchase.' Right? That's what you

20 did.

21 A. Yes.

22 Q. And then you took it away from them; right?

23 A. That's correct.

24 Q. And then after showing them the product but

25 before asking them the first question, you told them

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1 'If you don't know the answer to any of the questions,

2 it is okay to say so. Please do not guess.' Right?

3 A. That's correct.

4 Q. So that's the very last thing the respondent

5 hears before they hear the first question from your

6 interviewer; correct?

7 A. That's correct.

8 Q. Which is the inverse of what Dr. Mazis's did;

9 right?

10 A. Well, you want to show me?

11 Q. Dr. Mazis gave them the instruction first,

12 then showed them the product, then asked the question.

13 You showed the product first and then

14 instructed them about 'if you don't know, don't guess,'

15 and then asked the question; correct?

16 A. That's correct; yes.

17 Q. Now, again, we saw this before with Dr. Mazis,

18 but so we are clear, you told them 'if you don't know

19 the answer, it's okay to say so.' Right?

20 A. Yes.

21 Q. And then the question you asked is 'Do you or

22 don't you know who or what brand or company makes or

23 puts out the sugar substitute that I showed you.'

24 Correct?

25 A. That's correct.

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1 Q. You're asking them 'do you know.' Right?

2 A. That's correct.

3 Q. Immediately after telling them if you don't

4 know, don't guess; right?

5 A. That's correct.

6 Q. And that isn't quite the questions of Union

7 Carbide versus Ever Ready, which are, 'Who do you think

8 puts out the sugar substitute shown here?' That's how

9 it was done in the Ever Ready; right?

10 A. That's what the McCarthy treatise lists as the

11 traditional Ever Ready language.

12 Q. Have you looked at the Every Ready case

13 itself?

14 A. I have.

15 Q. And does McCarthy get it right?

16 A. Well, I assume Tom got it right, but I never

17 compared the language in the original to his treatise.

18 Q. Will you accept my representation that I did

19 it last night and he's got it word for word?

20 A. I would very much like to, yes.

21 Q. Okay. So whereas, in the Ever Ready test the

22 person is just shown the product and said 'Who do you

23 think puts this out?' You show them the product, you

24 instruct them 'If you don't know, tell me you don't

25 know, don't guess.' And you ask them 'Do you know or

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1 don't you know who puts this out?' Correct?
 2 A. Yes, that's correct.
 3 Q. Now let me just ask you -- Mr. Locascio has
 4 been doing this for the last day and a half, and I've
 5 been dying to do this. Can you read the brand name on
 6 this product from where you are?
 7 A. Actually, yes.
 8 Q. You can see that it's SAME.
 9 A. I can see that it's SAME.
 10 Q. And, by the way, you said something about this
 11 being a pretty new product in the market. But you know
 12 from at the least the last day or so sitting in this
 13 court room that the brand SAME isn't at all new in the
 14 Puerto Rican no-calorie sweetener market, is it?
 15 A. No, it is not.
 16 Q. In fact, it is the market leader based on
 17 volume in the no-calorie sweetener market in Puerto
 18 Rico; correct?
 19 A. It's the testimony I heard. SAME with sugar
 20 is the product that's new.
 21 Q. SAME in a blue box has been sold for ten
 22 years. Consumers in Puerto Rico are very familiar with
 23 the SAME brand name.
 24 That's Merisant's principal defense on
 25 confusion; right? People aren't going to mix up SAME

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1 percent of the people in your survey who were shown the
 2 SAME with sugar product, if that's what you guys want
 3 to call it, when it was taken away from them could not
 4 answer yes to the question, 'Do you know what brand I
 5 just showed you?'
 6 A. Well, the question said, 'What brand or
 7 company makes or puts out the sugar substitute that I
 8 showed you.'
 9 Q. Okay. So if they know what brand puts it out,
 10 they should say SAME; right? That's the brand that
 11 puts out that product, isn't it?
 12 A. Generally consumers don't repeat the name on
 13 the front of the box. When you ask them this question,
 14 they tell you who makes the product in the box or they
 15 tell you the sister product of the box. But generally
 16 they tell you who makes it.
 17 Q. Well, when you asked this question, 'Do you
 18 know what brand or company makes or puts out the sugar
 19 substitute,' that's your testimony that people don't
 20 just play back the brand of what they just saw; right?
 21 A. Generally speaking they don't just parrot the
 22 brand.
 23 Q. So they don't know that Merisant makes SAME;
 24 correct? Hardly anyone knows that. Would you agree
 25 with me?

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1 with SPLENDIA. They know SAME; right?
 2 A. They know SAME, yes.
 3 Q. So you can read it from where you're sitting;
 4 right?
 5 A. Yes, I can.
 6 Q. I'll walk back here. Can you still read it?
 7 A. I'm going to have to get my glasses out. I
 8 can, but at this point part of it is because I know
 9 what it says.
 10 Q. How about way back here?
 11 A. I'm going to need my glasses, though.
 12 Q. Go ahead and put them on.
 13 (The witness put on his eyeglasses.)
 14 A. Okay. I can see it, yes.
 15 Q. So it's not hard to see the brand name SAME,
 16 is it?
 17 A. No, it is not.
 18 Q. Nevertheless somehow in response to your
 19 question, 'Do you know what brand puts out the sugar
 20 substitute that I showed you,' 88 percent of Puerto
 21 Rican consumers in a market where SAME is the brand
 22 leader by volume, had no idea and had to say, 'No, I
 23 don't know.' Is that correct?
 24 A. Well, that's not how I interpret it, no.
 25 Q. Well, is it a fact, Mr. Johnson, that 88

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1 A. They don't know that EQUAL makes SAME or
 2 Merisant or SPLENDIA or...
 3 Q. Sure. Just like they don't know that McNeil
 4 makes SPLENDIA; right?
 5 A. Perhaps.
 6 Q. Same idea. They know it comes from some
 7 anonymous source; they can't necessarily name what that
 8 source is. They don't know that 7Up comes from Pepsi,
 9 or whatever it is; they know it's a brand that they are
 10 familiar with. That's how consumers think about
 11 products in these categories. Isn't that right?
 12 A. I think the answer to that is yes, but that
 13 was a long question.
 14 Q. Sure. Consumers know the difference between a
 15 brand of diet soda like Diet Pepsi and a genre of
 16 products like Diet Cola; right? They know Pepsi is a
 17 brand. If it comes from one place -- I know if I get
 18 Pepsi I'm assured of a certain quality or a certain
 19 taste, et cetera. Whereas if it just says 'Diet Cola,'
 20 I don't know exactly what I'm getting. That's what a
 21 brand is all about; right?
 22 A. Yes.
 23 Q. And I'm sure as an expert in litigation you
 24 know that the United States Supreme Court considers a
 25 brand to be synonymous with a single source; correct?

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